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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 CHAMBER OF COMMERCE OF THE  
12 UNITED STATES OF AMERICA, et  
al.,

2:05-CV-2257-MCE-KJM

13 Plaintiffs,

14 v.

MEMORANDUM AND ORDER

15 BILL LOCKYER, Attorney General  
16 of California, et al.,

17 Defendants.  
18

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19 Plaintiffs Chamber of Commerce of the United States of  
20 America ("Chamber of Commerce") and Xpedite Systems, LLC d/b/a  
21 Premiere Global Services ("Xpedite") (collectively, "Plaintiffs")  
22 have filed the instant action against Bill Lockyer, Attorney  
23 General of the State of California, and Charlene Zettel, Director  
24 of the California Department of Consumer Affairs (collectively,  
25 "Defendants") seeking a declaration that, insofar as it applies  
26 to interstate facsimile advertisements, Section 17538.43 of  
27 California's Business and Professions Code ("SB 833") is  
28 preempted by federal law and violates the Commerce Clause.

1 In addition, Plaintiffs seek an injunction permanently barring  
2 enforcement of SB 833. For the reasons set forth fully below,  
3 the Court grants Plaintiffs' request for declaratory relief  
4 hereby concluding that SB 833 is constitutionally infirm to the  
5 extent that it seeks to govern the interstate transmission of  
6 unsolicited facsimile advertisements. However, the Court  
7 refrains from addressing the issue of permanent injunctive relief  
8 until the propriety of such relief can be more fully assessed.

9  
10 **BACKGROUND**

11  
12 This case involves the convergence of certain federal and  
13 state laws including the Federal Communications Act of 1934  
14 ("FCA"), the Telephone Consumer Protection Act of 1991 ("TCPA"),  
15 as amended by the Junk Fax Protection Act of 2005  
16 ("JFPA") (collectively "Federal Laws"), and California's SB 833.  
17 The foregoing Federal Laws generally create a statutory framework  
18 that governs interstate telecommunications and, particularly at  
19 issue here, the transmission of unsolicited facsimile  
20 advertisements. Through SB 833, California's Legislature is  
21 seeking to accord the citizens of California with more stringent  
22 protections than those afforded under the federal scheme.

23 The specific divergence between the two schemes that has  
24 given rise to this litigation is as follows. The federal scheme  
25 permits a party to transmit unsolicited facsimile advertisements  
26 to recipients with whom they have an "established business  
27 relationship" provided those advertisements bear an opt-out  
28 alternative.

1 Conversely, California's scheme, as embodied in SB 833, omits the  
2 established business relationship exception and, instead,  
3 requires a sender to obtain express prior consent before  
4 transmitting any facsimile advertisements into or out of  
5 California.

6 In order to properly assess the constitutional concerns  
7 raised by SB 833, the Court must first set forth both the federal  
8 and state schemes to examine the foundation each legislative body  
9 was intending to lay. Accordingly, what follows is a brief  
10 recitation of the present federal and state regulatory schemes.

11  
12 **A. The Federal Communications Act of 1934**

13  
14 The text of the FCA explains that "[t]he provisions of [the  
15 FCA] shall apply to all interstate and foreign communication by  
16 wire or radio." 47 U.S.C.S. § 152(a). As a general matter, this  
17 provision commits to the FCC the right to govern interstate  
18 telecommunications. Likewise, subject to certain exceptions, the  
19 FCA generally commits to the States jurisdiction to regulate  
20 intrastate telecommunications. 47 U.S.C.S. § 152(b).

21  
22 **B. The Telephone Consumer Protection Act of 1991**

23  
24 In 1991, Congress enacted the TCPA, Pub. L. No. 102-243, 105  
25 Stat. 2394 (1991).

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1 The TCPA added Section 227 to the FCA making it unlawful "to use  
2 any telephone facsimile machine, computer, or other device to  
3 send, to a telephone facsimile machine, an unsolicited  
4 advertisement, unless--(i) the unsolicited advertisement is from  
5 a sender with an established business relationship with the  
6 recipient." 47 U.S.C.S. § 227(b)(1)(C). The TCPA defines an  
7 "unsolicited advertisement" as "any material advertising the  
8 commercial availability or quality of any property, goods, or  
9 services which is transmitted to any person without that person's  
10 prior express invitation or permission, in writing or otherwise."  
11 *Id.* at § (a)(5). Congress also included a savings clause, the  
12 language of which is set forth in Section II.B. *infra.* See *Id.*  
13 at § 227(e)(1).

#### 14 C. The 1992 Rules

15  
16 In 1992, the FCC adopted rules implementing the TCPA. In  
17 explaining the rule implementing the "established business  
18 relationship" exception to the TCPA ban on unsolicited facsimile  
19 advertisements, the FCC stated that facsimile transmission of  
20 advertisements from persons or entities that have an established  
21 business relationship with the recipient can be deemed to be  
22 invited or permitted by the recipient. *Rules and Regulations*  
23 *Implementing the Telephone Consumer Protection Act of 1991,*  
24 *Report and Order*, 7 FCC Rcd. 8752 at 8779, ¶ 54 n.87 (1992). The  
25 Commission stated that this "established business relationship"  
26 exception was justified because a solicitation to someone with  
27 whom a prior business relationship exists does not adversely  
28 affect subscriber privacy interests.

1 *Id.* ¶ 34; see *id.* ¶ 54 n.87. The 1992 rules continued unabated  
2 until 2003 when the FCC proposed a revision to its 1992 rules.

3  
4 **D. The 2003 Rules**  
5

6 In 2003, the FCC announced that it planned to reverse its  
7 prior conclusion that an established business relationship  
8 provides companies with the necessary express permission to send  
9 faxes to their customers. *Final Rule, Rules and Regulations*  
10 *Implementing the Telephone Consumer Protection Act*, 68 Fed. Reg.  
11 44, 144 (2003). Under the proposed 2003 rule, a business would  
12 be permitted to advertise by fax only with the prior express  
13 permission of the fax recipient, which would have to have been in  
14 writing and include the recipient's signature and facsimile  
15 number, and could not be in the form of an opt-out provision.  
16 *Rules and Regulations Implementing the Telephone Consumer*  
17 *Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14, 014  
18 (2003).

19 In response to the 2003 proposed rule on this issue, the  
20 Senate Committee on Science, Commerce, and Transportation  
21 ("Senate Committee") stated that the FCC's proposed rule  
22 revisions "effectively eliminate[ed] the [existing business  
23 relationship] exception to the general prohibition on unsolicited  
24 fax advertisements." S. Rep. No. 109-76, at 3. The 2003 FCC  
25 rule revisions were repeatedly suspended and, ultimately, were  
26 rendered moot by the enactment in 2005 of the JFPA.

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1           **E. Junk Fax Protection Act of 2005**

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3           On July 9, 2005, President George W. Bush signed into law  
4 the Junk Fax Prevention Act of 2005 ("JFPA"), Pub. L. No. 109-21,  
5 119 Stat. 359 (2005). The JFPA amended Section 227 to permit  
6 businesses and other entities to send, without the recipient's  
7 prior express consent, commercial facsimiles to recipients with  
8 whom they enjoy an established business relationship. 47  
9 U.S.C.S. § 227(a)(2). The Senate Committee's report on the JFPA  
10 expressly stated that the purpose of the bill was to "[c]reate a  
11 limited statutory exception to the current prohibition against  
12 the faxing of unsolicited advertisements to individuals without  
13 their prior express invitation or permission by permitting such  
14 transmission by senders of commercial faxes to those with whom  
15 they have an established business relationship." S. Rep. No.  
16 109-76, at 1 (internal quotations omitted).

17           Although the Senate Committee expressed its view that the  
18 established business relationship exception was an appropriate  
19 exception to the ban on unsolicited facsimile advertisements, the  
20 Senate Committee also determined that it was necessary to provide  
21 recipients with the ability to stop future unwanted facsimiles  
22 sent pursuant to such relationships. *Id.* at 7. Consequently,  
23 the Senate Committee proposed adding a requirement that every  
24 unsolicited facsimile advertisement contain an opt-out notice  
25 that gives the recipient the ability to stop future unwanted  
26 facsimile solicitations and that senders of such advertisements  
27 provide recipients with a cost-free mechanism to stop future  
28 unsolicited facsimiles. *Id.*

1 According to the Senate Committee, the "established business  
2 relationship" exception permits "legitimate businesses to do  
3 business with their established customers and other persons with  
4 whom they have an established relationship without the burden of  
5 collecting prior written permission to send these recipients  
6 commercial faxes." *Id.* at 6. The Senate Committee report went  
7 on to explain that abandoning the FCC's 1992 rule in favor of its  
8 proposed 2003 rules, would have "significant consequences." *Id.*  
9 Specifically, the cost and effort of compliance could place  
10 significant burdens on some businesses, particularly those small  
11 businesses that rely heavily on the efficiency and effectiveness  
12 of facsimile machines. *Id.* Noting that businesses had  
13 "appropriately relied" on the 1992 rules over the past decade,  
14 the Senate report concluded that "[i]f the revised rules go into  
15 effect, the previously legitimate practices will be immediately  
16 unlawful, and unsuspecting or uninformed businesses may be  
17 subject to unforeseen and costly litigation unrelated to  
18 legitimate consumer protection aims." *Id.*

19  
20 **F. The California Statute**

21  
22 On October 7, 2005, Governor Arnold Schwarzenegger signed  
23 into law SB 833. As noted above, this California legislation  
24 provides that:

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1 "It is unlawful for a person or entity, if  
2 either the person or entity or the recipient  
3 is located within California, to use any  
4 telephone facsimile machine, computer, or  
5 other device to send, or cause another person  
6 or entity to use such a device to send, an  
7 unsolicited advertisement to a telephone  
8 facsimile machine."

9 Ch. 667, § 1, 2005 Cal. Stat. 93, 94 (2005).

10 Facsimiles sent without "prior express invitation or  
11 permission" are defined as "unsolicited" under Section  
12 17538.43(a)(2). *Id.* The Assembly Committee on Appropriations  
13 explained that SB 833 was being enacted, in part, because  
14 Congress was considering the JFPA which codified the established  
15 business relationship exception and favored an opt-out scheme  
16 rather than an opt-in scheme. See Cal. Assembly Comm., Analysis  
17 of Sen. Bill 833 (2005-2006 Reg. Sess.), at 1 (July 13, 2005);  
18 see also Sen. Judiciary Comm., Analysis of Sen. Bill 833 (2005-  
19 2006 Reg. Sess.), at 1,3 (April 5, 2005). It is unquestioned  
20 that California's legislature, in enacting SB 833, was attempting  
21 to accord the citizens of the State of California with greater  
22 protections than those afforded under the federal scheme.

### 23 STANDARD

24 Plaintiffs have styled their motion as one for a temporary  
25 restraining order, however, they have requested both declaratory  
26 relief as well as a permanent injunction. The Parties and the  
27 Court agreed at oral argument that this motion should be treated  
28 as one for declaratory relief rather than one for injunctive  
relief.



1 The operation of the Declaratory Judgment Act is procedural only.  
2 *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 94  
3 L. Ed. 1194, 70 S. Ct. 876 (1950) (citations and quotations  
4 omitted). Generally, declaratory judgment actions are  
5 justiciable if "there is a substantial controversy, between  
6 parties having adverse legal interests, of sufficient immediacy  
7 and reality to warrant the issuance of a declaratory judgment."  
8 *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273,  
9 85 L. Ed. 826, 61 S. Ct. 510 (1941). Declaratory relief is  
10 appropriate when, as here, (1) the judgment will serve a useful  
11 purpose in clarifying and settling the legal relations in issue,  
12 and (2) the judgment will terminate and afford relief from the  
13 uncertainty, insecurity, and controversy giving rise to the  
14 proceeding. *Eureka Fed. Sav. & Loan Asso. v. Am. Cas. Co.*, 873  
15 F.2d 229, 231 (9th Cir. 1989) (citations and quotations omitted).

16 Plaintiffs are also seeking injunctive relief against  
17 enforcement of SB 833's prohibition on interstate facsimile  
18 advertising. Plaintiffs originally sought a preliminary  
19 injunction, but later sought a temporary restraining order. In  
20 their prayer for relief, Plaintiffs requested permanent  
21 injunctive relief. Defendants approached the present motion as  
22 one for preliminary relief as opposed to one for permanent  
23 relief. Because the standards for each are distinct, the Court  
24 inquired at oral argument whether Defendants were prepared to  
25 proceed on Plaintiffs' request for injunctive relief as a  
26 permanent rather than preliminary or temporary remedy.  
27 Defendants indicated that more time would be required to properly  
28 respond to Plaintiffs' request for permanent relief.

1 Accordingly, while the Court is prepared to rule on Plaintiffs'  
2 Motion for Declaratory Relief, the Court reserves its judgment  
3 regarding the issuance of injunctive relief and will address that  
4 matter, if necessary, after a full hearing on the merits.

5  
6 **ANALYSIS**

7  
8 As noted above, California's SB 833 attempts to heighten the  
9 restrictions applied to the transmission of unsolicited facsimile  
10 advertisements. Specifically, SB 833 omits the "established  
11 business relationship" exception provided under Federal Law and,  
12 instead, requires any party seeking to transmit a facsimile  
13 advertisement into or out of California to obtain express prior  
14 consent from the recipient before doing so. The salient  
15 distinction between Federal Law and SB 833 is two-tiered. First,  
16 Federal Law expressly permits a party to transmit an unsolicited  
17 facsimile advertisement to those with whom an established  
18 business relationship exists while SB 833 omits any such  
19 exception. Second, Federal Law permits senders to transmit  
20 unsolicited advertising facsimiles under the established business  
21 relationship exception so long as the advertisement bears an  
22 "opt-out" alternative while SB 833 requires senders to obtain an  
23 affirmative "opt-in" before engaging in any such transmission.

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1 I. JURISDICTION  
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3 As their lead argument, Plaintiffs aver that the State of  
4 California has no jurisdiction to regulate interstate commerce as  
5 it purports to do through SB 833 because that authority is the  
6 exclusive jurisdiction of the FCC. Plf.s' Mtn. for Temp.  
7 Restraining Order P. 12 - 16 ("Plf.s' Memo."). Conversely,  
8 Defendants argue that the FCA reserves to the States the right to  
9 regulate certain interstate communications including the  
10 transmission of unsolicited facsimile advertisements. Def.s'  
11 Opp. to Mtn. for Temp. Restraining Order P. 15 - 18 ("Def.s'  
12 Opp.").

13 When speaking to the question of whether the FCC has  
14 exclusive jurisdiction to regulate interstate telecommunications,  
15 the Supreme Court explained that the FCA generally grants to the  
16 FCC the authority to regulate "interstate and foreign commerce in  
17 wire and radio communication," 47 U.S.C.S. § 151, while expressly  
18 denying the FCC "jurisdiction with respect to ... intrastate  
19 communication service ...." 47 U.S.C.S. § 152(b). *Public Serv.*  
20 *Com v. FCC*, 476 U.S. 355, 360 (1986) (internal citations omitted).  
21 However, the Court went on to clarify that "... while the FCA  
22 would seem to divide the world ... neatly into two hemispheres --  
23 one comprised of interstate service, over which the FCC would  
24 have plenary authority, and the other made up of intrastate  
25 service, over which the States would retain exclusive  
26 jurisdiction -- in practice, the realities of technology and  
27 economics belie such a clean parceling of responsibility." *Id.*

28 ///

1 Plaintiffs' argument, that States are devoid of authority to  
2 regulate interstate telecommunications, is simply too broad. In  
3 fact, as expressly noted above, the Supreme Court recognized that  
4 such a clean parceling of responsibility is unworkable. *Id.* In  
5 addition, there are many examples of Congressional intent to  
6 reserve certain rights to the States. For example, the FCA  
7 expressly reserves the right to "impose ... requirements  
8 necessary to ... protect the public safety and welfare ... and  
9 safeguard the rights of consumers" to States. 47 U.S.C.S. §  
10 253(b). Similarly, the FCA expressly permits States to establish  
11 terms and conditions for wireless services, other than those that  
12 directly regulate rates or market entry. 47 U.S.C.S. §  
13 332(c)(3)(A).

14 As is clear from the foregoing, the FCA contains exceptions  
15 to the general proclamation that interstate telecommunications  
16 are committed to the FCC's jurisdiction alone. Accordingly, the  
17 Court cannot dispose of the matter before it by summarily  
18 concluding that, as a matter of law, the FCC has plenary  
19 jurisdiction to regulate interstate telecommunications thereby  
20 precluding California from doing so. Instead, the Court must  
21 narrow its focus to whether the language of the Federal Law  
22 grants to the States the right to regulate the transmission of  
23 unsolicited facsimile advertisements as California purports to do  
24 through SB 833.

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1 **II. PREEMPTION**

2  
3 When the Federal Government acts within the authority it  
4 possesses under the Constitution, it is empowered to preempt  
5 state laws to the extent it is believed that such action is  
6 necessary to achieve its purposes. See *New York v. FCC*, 486 U.S.  
7 57, 63-64, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988). The  
8 Supremacy Clause of the Constitution gives force to federal  
9 action of this kind by stating that "the Laws of the United  
10 States which shall be made in Pursuance" of the Constitution  
11 "shall be the supreme Law of the Land." U.S. Const., Art. VI,  
12 cl. 2.

13 Preemption occurs when Congress, in enacting a federal  
14 statute, expresses a clear intent to preempt state law, when  
15 there is outright or actual conflict between federal and state  
16 law, where compliance with both federal and state law is in  
17 effect physically impossible, where there is implicit in federal  
18 law a barrier to state regulation, where Congress has legislated  
19 comprehensively, thus occupying an entire field of regulation and  
20 leaving no room for the States to supplement federal law, or  
21 where the state law stands as an obstacle to the accomplishment  
22 and execution of the full objectives of Congress. *La. Pub. Serv.*  
23 *Comm'n*, 476 U.S. at 369.

24 Irrespective of the variety of preemption at issue, the  
25 Ninth Circuit has clarified that the touchstone issue is not the  
26 nature of the state regulation, but the language and  
27 congressional intent of the specific federal statute.

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1 *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir.  
2 1998) (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471  
3 U.S. 724, 738, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985); *Shaw v.*  
4 *Delta Air Lines, Inc.*, 463 U.S. 85, 95, 77 L. Ed. 2d 490, 103 S.  
5 Ct. 2890 (1983) (Preemption of state law is compelled if  
6 Congress' command is explicitly stated in the federal statute's  
7 language or implicitly contained in its structure or purpose.))

8  
9 **A. Presumption Against Preemption**

10  
11 First, because the States are independent sovereigns in our  
12 federal system, the federal courts have long presumed that  
13 Congress does not cavalierly preempt state-law causes of action.  
14 *Bates v. Dow Agrosciences L.L.C.*, 125 S. Ct. 1788, 1801  
15 (2005) (citations and quotations omitted). While the foregoing  
16 presumption against preemption is the starting point in all  
17 preemption cases, this presumption is not always applicable.  
18 Indeed, when the State regulates in an area where there has been  
19 a history of significant federal presence, the presumption  
20 usually does not apply. *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th  
21 Cir. 2003). Here, there is no dispute that the area of  
22 interstate telecommunications has a history of significant  
23 federal presence. Indeed, since the passing of the FCA in 1934,  
24 there has been a tremendous amount of federal legislation  
25 regarding interstate telecommunications including legislation  
26 directly concerned with the transmission of unsolicited facsimile  
27 advertisements.

28 ///

1 Consequently, the Court finds that the presumption against  
2 preemption inapplicable to the case at bar.

3  
4 **B. Statutory Construction**

5  
6 As explained above, Section 151 of the FCA, together with  
7 the later decisions interpreting the same, generally allocate to  
8 the FCC the right to govern interstate telecommunications. Here,  
9 however, Congress included a savings clause that parses the  
10 authority to regulate the use of telephone equipment, including  
11 facsimile machines, between the States and the FCC.

12 That savings clause provides as follows:

13 "STATE LAW NOT PREEMPTED.—Except for [certain specified  
14 provisions of the TCPA], nothing in this section or in  
15 the regulations prescribed under this section shall  
16 preempt any State law that imposes more restrictive  
17 intrastate requirements or regulations on, or which  
18 prohibits—(A) the use of telephone facsimile machines  
19 or other electronic devices to send unsolicited  
20 advertisements."

21 *Id.* at § 227(e) (1).

22 Defendants urge the Court to dissect the forgoing provision  
23 into two parts as follows: Nothing in this section shall preempt  
24 any state law that [clause 1] imposes more restrictive *intrastate*  
25 requirements or regulations on; or [clause 2] which prohibits the  
26 use of telephone facsimile machines to send unsolicited  
27 advertisements. Defendants first suggest that the savings clause  
28 was included in Section 227 simply to make clear that Federal Law  
does not preempt more restrictive intrastate requirements or  
regulations.

///

1 Defendants go on to argue that Congress' inclusion of the  
2 *intrastate* qualifier in clause 1 and its omission of that same  
3 qualifier in clause 2 should be interpreted to mean that Federal  
4 Law does not preempt more restrictive intrastate requirements nor  
5 does it preempt prohibitions of either intrastate or interstate  
6 telecommunications.

7 Defendants' proposed interpretation produces an ungainly  
8 construction that the Court does not believe Congress intended.  
9 In addition, Defendants' construction fails to answer the salient  
10 issue in this case. That is, whether the savings clause acts to  
11 salvage a State's right to pass more restrictive *interstate*  
12 requirements on transmitters of unsolicited facsimile  
13 advertisements.

14 In construing the language of a statute, the Supreme Court  
15 has clarified that it is the duty of the Court to give effect, if  
16 possible, to every clause and word. *Duncan v. Walker*, 533 U.S.  
17 167, 174 (2001) (citing *United States v. Menasche*, 348 U.S. 528,  
18 538-539, 99 L. Ed. 615, 75 S. Ct. 513 (1955); see also *Williams*  
19 *v. Taylor*, 529 U.S. 362, 404, 146 L. Ed. 2d 389, 120 S. Ct. 1495  
20 (2000) (describing this rule as a "cardinal principle of statutory  
21 construction").

22 Under Defendants' rendition, Congress' inclusion of Section  
23 227(e)(1) has no operative effect because it acts solely to  
24 reiterate States' preexisting right to enact more restrictive  
25 intrastate regulations on telecommunications. Under this theory,  
26 the entire first section of the savings clause could be omitted  
27 without affecting a State's right to enact intrastate regulations  
28 on telecommunications.



1 The Court must be "reluctant to treat statutory terms as  
2 surplusage" in any setting. *Babbitt v. Sweet Home Chapter,*  
3 *Communities for Great Ore.*, 515 U.S. 687, 698, 132 L. Ed. 2d 597,  
4 115 S. Ct. 2407 (1995). In order to give the savings clause an  
5 operative meaning, the Court hereby concludes that Section  
6 227(e)(1) salvages, rather than merely reiterates, States' rights  
7 to govern intrastate transmissions of unsolicited facsimile  
8 advertisements.

9 In light of the Court's conclusion that Section 227(e)(1)  
10 saves States' rights to impose more restrictive *intrastate*  
11 regulations from preemption, it turns to the question of whether  
12 that Section also acts to salvage regulations that impose  
13 restrictions on *interstate* telecommunications as California  
14 purports to do through SB 833. Here, the Court must consider  
15 Congress' inclusion of the word "intrastate" in the savings  
16 clause. If the savings clause is construed to preserve the right  
17 to restrict both intrastate and interstate telecommunications,  
18 then the word "intrastate" places no constraint on the States'  
19 jurisdiction over telecommunications and the inclusion of the  
20 word "intrastate" would be surplusage. As noted above, the Court  
21 believes that its duty to give each word some operative effect  
22 where possible precludes such a construction.

23 In addition to the foregoing examination of the statutory  
24 language, an examination of the legislative history of the  
25 federal scheme shows that Congress' purpose in passing the JFPA  
26 was to retain the established business relationship exception for  
27 the transmission of unsolicited facsimile advertisements.

28 ///

1 Specifically, in 2003 when the FCC proposed to abolish the  
2 established business relationship exception, Congress responded  
3 by enacting the JFPA and codifying that exception. Further, in  
4 the same report that the Senate Committee expressed its view that  
5 the established business relationship exception was an  
6 appropriate exception to the ban on unsolicited facsimile  
7 advertisements, it also determined that an opt out scheme would  
8 present an appropriate mechanism to stop unwanted facsimile  
9 advertisements. S. Rep. No. 109-76, at 7. This countermeasure  
10 is evidence that Congress understood the concerns voiced by  
11 consumers and elected to create an opt-out scheme to address  
12 those concerns.

13 In this instance, SB 833 stands as an obstacle to the  
14 accomplishment and execution of the full purposes and objectives  
15 of Congress because it eliminates the established business  
16 relationship exception that Congress expressly codified in the  
17 JFPA and nullifies Congress' decision that unsolicited facsimile  
18 advertisements be governed by an "opt-out" rather than an "opt-  
19 in" scheme. See *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed.  
20 581, 61 S. Ct. 399 (1941); *Geier v. Am. Honda Motor Co.*, 529 U.S.  
21 861, 899, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000) (quoting  
22 *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d  
23 385, 115 S. Ct. 1483 (1995)). Consequently, the Court finds  
24 that, to the extent California attempts to regulate the  
25 interstate transmission of unsolicited facsimile advertisements  
26 through SB 833, it has exceeded its jurisdiction rendering that  
27 portion of the statute violative of the Supremacy Clause and,  
28 therefore, constitutionally infirm.

1 In conclusion, the Court wishes to stress that it is mindful  
2 of the burden created by unsolicited facsimile advertisements.  
3 The Court recognizes that unsolicited advertisements transmitted  
4 via facsimile machines cost recipients untold resources in the  
5 form of time and money. Despite these realities, the Court  
6 cannot unilaterally raze the legal landscape carefully cultivated  
7 by Congress. In fact, today's decision leaves untouched the  
8 protections against unsolicited faxes afforded by Federal Law as  
9 well as California's SB 833 to the extent it applies to  
10 intrastate telecommunications. Specifically, unsolicited faxes  
11 to individuals from entities with whom they do not enjoy a  
12 business relationship are still barred under Federal Law.  
13 Similarly, consumers' retain the right to preclude, or opt-out,  
14 of unsolicited faxes even when an established business  
15 relationship does exist. Indeed, while SB 833 suffers from  
16 constitutional infirmity with respect to its interstate reach,  
17 the protections afforded California consumers for intrastate  
18 facsimile transmissions remain inviolate.

#### 19 20 CONCLUSION


21  
22 The Court finds that a judgment in favor of Plaintiffs will  
23 serve a useful purpose in clarifying and settling the  
24 constitutional issues raised by SB 833 and will terminate and  
25 afford relief from the uncertainty, insecurity, and controversy  
26 giving rise to this action. The Court concludes that SB 833 is  
27 unconstitutional to the extent it attempts to govern interstate  
28 transmission of unsolicited facsimile advertisements.

1 Accordingly, declaratory judgment is appropriate and final  
2 judgement in favor of Plaintiffs is therefore entered. However,  
3 the Court reserves judgment regarding injunctive relief until the  
4 Parties have a full and fair opportunity to be heard on the  
5 merits of their respective claims.

6  
7 IT IS SO ORDERED.

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9 DATED: February 27, 2006

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MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE